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U.S. Department of Justice
Office of Information Law and Policy

FOIA UPDATE

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FOIA in a Time of Crisis—NRC and Three Mile Island

The accident at the Three Mile Island Nuclear Power Plant (TMI) on March 28, 1979, provided the U.S. Nuclear Regulatory Commission with a test of FOIA in a crisis situation—a situation which offered an unprecedented challenge to the agency's ability to fulfill its obligations to FOIA requesters at a time when the energies of the entire staff were focused on protecting the public health and safety and averting a possible disaster.

NRC was able to cope with its FOIA responsibilities in the midst of a major emergency, largely due to the strong support of the NRC Commissioners for a policy of openness. Other important factors were the strong centralized structure of the FOIA organization in NRC, and the staff's ability to enlist the cooperation of requesters in permitting NRC to stretch response deadlines in exchange for a promise that documents would be processed and made available on a continuing basis as soon as practicable.

Several policy decisions were made very quickly after the magnitude of the TMI accident became apparent:

(1) All requests for agency records concerning the accident would be interpreted broadly to include pre-accident records;

(2) No search fees would be charged;

(3) Copies of all released documents would be made publicly available as soon as possible in NRC's Public Document Rooms in both Washington, D.C., and Harrisburg, Pennsylvania;

(4) A computerized index, with frequent updates, would be available for easy access to all released documents.

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After the nuclear accident at Three Mile Island, NRC made relevant records available to FOIA requesters and the general public in the NRC Public Document Room in downtown Washington at 1717 H Street, N.W.

Estimating FOIA Costs

In 1974 Congress amended FOIA to strengthen public access to government information. The legislative history shows that the cost of this enhanced access was thought to be relatively small. The Senate Committee on the Judiciary determined that "the total maximum projected cost of S. 2543 would be $40,000 per year," and the House Committee on Government Operations determined that "additional costs that may be required by this legislation [H.R. 12471] should not exceed $50,000 in fiscal year 1974 and $100,000 for each of the succeeding five fiscal years."

In early 1979, the Office of Information Law and Policy surveyed federal agencies on their 1978 costs and gains in administering FOIA. A tabulation of the responses shows FOIA costs in 1978 of an estimated $47.8 million, considerably in excess of the Congressional cost estimates of five years earlier. Well over 80 percent of this represents personnel, with the

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FOIA UPDATE

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FOIA IN CRISIS

(Continued from page 1)

The NRC's Executive Director for Operations also sent a notice to remind all NRC employees to preserve all records concerning TMI. This was followed by a second notice requesting all employees involved in the accident to record, for any subsequent investigation, their recollections of the first two days after the accident.

HANDLING TMI REQUESTS

NRC received its first FOIA request concerning TMI on April 4, seven days after the accident. By that time, plans for handling FOIA responses were well underway. FOIA coordinators in every NRC Office were notified to forward copies of all TMI documents to the FOIA Branch in the Division of Rules and Records, which is responsible for answering all FOIA requests. This Branch sent some of its own staff to the trailer offices hastily installed on Three Mile Island. There they worked side by side with the technical staff, making copies of documents almost before the ink was dry on the originals, and began the review for information which would fall under the privacy and proprietary exemptions of FOIA.

In all, 40 FOIA requests were received for TMI documents. Requesters were informed of NRC's plans for responding to the requests, and were told that because many of the persons who would have to locate and review documents subject to the request were the very ones engaged in bringing the facility to a "cold shutdown" and protecting public health and safety, the full response would have to be delayed. Telephone contact was maintained between requesters and FOIA staff throughout the process, and the fact that no one chose to appeal the extended response period suggests that all understood the severity of the TMI situation and NRC's efforts to keep the public informed.

NRC's COMPUTERIZED INDEX

One of the key factors which helped in processing the voluminous quantity of records involved in the FOIA requests was NRC's computerized document control system which is operated by a contractor. As soon as documents were reviewed, they were forwarded on a daily basis to the contractor who assigned each one a unique number, indexed it, and entered it into the computerized system. Daily printouts were prepared which were eventually compiled into bound volumes listing some 7,000 documents which ranged in length from one page to several hundred.

As soon as the documents were indexed, they were forwarded to NRC's Public Document Room (PDR), located at 1717 H St., N.W., in downtown Washington, D.C., and to a PDR in Harrisburg, Pennsylvania, not far from the TMI site.

FOIA staff sent periodic responses to the requesters—one requester received eight responses—notifying them as new categories of records were released. Requesters were sent copies of the title lists as they were printed so they could send mail orders for the documents they wanted.

Three Mile Island was an acid test of the Government's FOIA policy. It proved that, given a strong FOIA commitment, a well-organized plan of procedure, a spirit of cooperation within the agency, and a willingness by responders to waive rigid deadlines—combined with the availability of a sophisticated technology — the Freedom of Information Act can operate effectively in a time of crisis.

FOIA Counselor

What is a FOIA Request?

This question has caused much confusion for years.

The answer to the question determines whether a given request is one which obligates an agency *at least to consider* the requester's rights or claim of rights under FOIA. The present discussion deals with the question in this sense. And the answer may often be yes, it is a FOIA request, even if it is defective under FOIA. If, as discussed below, a request is defective, the agency's obligation can often be satisfied by informing the requester of the defect. If it is not, however, the agency must comply with all FOIA processing requirements; i.e., search, examination and analysis, and granting of access to all non-exempt material within the scope of the request.

THE STATUTE

The statute obligates federal agencies to respond to "any request for records" from "any person." 5 U.S.C. §552(a)(3). The only limitations in the statute itself are that the request must be one "which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed . . ."

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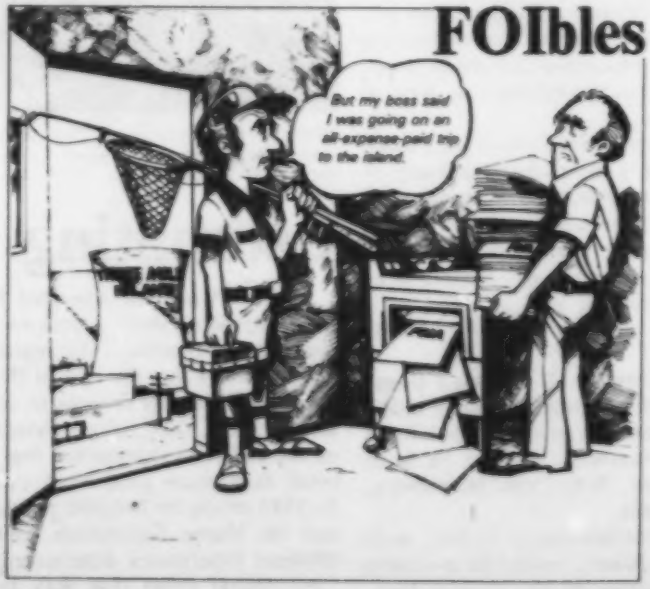

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Policy Discussion: Business Confidentiality After *Chrysler*

Although the Supreme Court issued a lengthy decision in April, 1979, on the law surrounding "reverse" FOIA suits (*see Chrysler Corp. v. Brown*, 441 U.S. 281 (1979)), this decision leaves several crucial issues undecided, making it impossible to provide a comprehensive and certain statement of what the law involved in such "reverse" suits is at present. In June, 1979, the U.S. Department of Justice, after identifying the unresolved issues, set out its position on those issues for the guidance of agencies.

The Office of Information Law and Policy on June 15, 1979, and the Civil Division on June 21, 1979, issued separate papers. The following article summarizes those papers and was prepared by Douglas N. Letter, Appellate Staff, Civil Division, and Daniel Clement, Assistant U.S. Attorney, Office of the U.S. Attorney, Los Angeles, California, in consultation with Douglas S. Wood, Deputy Director, and Robert L. Saloschin, Director, Office of Information Law and Policy.

TO RELEASE OR TO WITHHOLD?

Reverse Freedom of Information Act (FOIA) lawsuits arise after a person requests information contained in the records of a government agency which the submitter of that information does not want released. The submitter goes to court to block an anticipated release by the agency. Although the Supreme Court held in *Chrysler* that there is nothing in FOIA which authorizes a person to file a reverse FOIA suit, the Court held that review by the courts was available under Section 10 of the Administrative Procedure Act, 5 U.S.C. §702 *et. seq.* (1976). Whatever the technical legal basis for such a suit, the popular phrase "reverse FOIA suit" continues in use to describe such legal actions.

Typically, reverse FOIA suits are filed by business corporations to block release of information regarding their own business affairs. These suits have often involved equal employment opportunity information which executive orders require government contractors to file. Requesters seek this information in order to analyze enforcement by the Department of Labor's Office of Federal Contract Compliance of the executive orders requiring equal opportunities for employment with government contractors for minorities and women. The contractors who submit the information have sought to block release of much of this data because they contend that it reveals confidential details concerning their operations and personnel which they wish to keep from their competitors.

The Supreme Court in *Chrysler* confirmed again that exemptions in the FOIA are permissive rather than mandatory. Therefore, one might conclude that the choice simply rests with an agency whether or not to release exempt data. If material is not within any FOIA exemption, its release is required by the Act. If material is within a FOIA exemption, FOIA would allow the agency either to withhold it or to disregard the exemption and release the material.

However, the issue is not this simple, because there are other statutes and legal principles which govern release of information besides FOIA. Congress recognized this principle when it passed FOIA, as shown by FOIA Exemption 3. This exemption, in essence, provides that certain statutes which prohibit disclosure of information will actually be read into FOIA itself and may control the agency's action.

This interface of laws is where many of the problems arise in reverse FOIA suits.

In view of these perplexing problems, a suggested procedure is set forth below for analyzing and handling FOIA requests for information submitted to the federal government by businesses.

Basic Steps for Agency Processing of FOIA Requests for Disclosure of Information Generated by Private Business Sources

Agency attorneys and administrators reviewing FOIA requests for disclosure of information submitted to the government by private business sources ("submitters") should consider the following basic procedures:

STEP ONE: ANALYZE FOIA EXEMPTIONS AND THE TRADE SECRETS ACT

When a FOIA request for information obtained from a submitter is received, the first inquiry concerns FOIA itself. The agency must determine if any FOIA exemption applies to the requested information. Usually in the reverse FOIA context only exemptions 3, 4, and 6 need be examined.

Exemption Four

The most likely exemption is Exemption 4, which states that the agency may withhold certain commercial information. This exemption has generally been interpreted chiefly to cover privately generated commercial information whose release is likely to cause substantial competitive harm. The leading case on Exemption 4 is *National Parks and Conservation Assn. v. Morton*, 498 F. 2d 765 (D.C. Cir. 1974). Deciding whether business information fits this description is sometimes not simple, and no easy formulas have been developed for the debatable cases. See Chapters IV and IX of "A Short Guide to the Freedom of Information Act" published with the March, 1979, Edition, of the *Freedom of Information Case* List, for a further discussion of Exemption 4.

READEX

The Trade Secrets Act

If requested material is outside Exemption 4, the next question is whether it falls within another statute read into FOIA through Exemption 3. Information submitters have contended that the Trade Secrets Act is an Exemption 3 statute while the Justice Department position is to the contrary.

The submitters of information have brought "reverse" suits to stop agencies from releasing information which they contend falls within the Trade Secrets Act (18 U.S.C. §1905), a criminal statute. They argue that this act is an "Exemption 3 statute," which would prevent disclosure of any information in the Government's possession which reveals details about their businesses and operations. The Supreme Court expressly left this question, as well as other important questions, undecided in *Chrysler*. The problem with the Trade Secrets Act is that by its very broad wording, it would cover, if given a literal reading, almost every conceivable piece of commercial information in government hands. For example, the government could not legally disclose that General Motors is in the automobile business.

The Justice Department position is that the Act does not mean what its actual wording might indicate, partly because of the unreasonable conclusions that would follow and partly because the Act was created from three narrowly worded statutes in 1948. Under rules governing the proper interpretation of statutes enacted as part of the revision of the criminal code (Title 18) in 1948, such statutes are only as broad as their predecessor statutes. Defining the precise scope of the Trade Secrets Act has become quite complex, but the Justice Department view is that equal employment opportunity information is not the type of data covered by the Act's predecessors. It would be best for agency counsel to check with the Department of Justice if any other types of documents are involved.

Thus, the Justice Department position is that the Trade Secrets Act is too "oceanic" and ill defined to qualify as an Exemption 3 statute, especially since Congress narrowed Exemption 3 in 1976. In addition, the Trade Secrets Act does not "require" non-disclosure, as one prong of Exemption 3 demands. Instead, the Trade Secrets Act only prohibits disclosures not "authorized by law." If the Justice Department is correct, and thus far most courts have agreed, then the Trade Secrets Act is not to be read into the FOIA through Exemption 3.

On November 30, 1979, the Eighth Circuit Court of Appeals held that the Trade Secrets Act is not a third exemption statute. The court said that the Trade Secrets Act only prohibits disclosures "not authorized by law." The court outlined the sequence of analysis that an agency should follow. *See, General Dynamics Corp. v. Marshall*, 572 F.2d 1211 (8th Cir. 1978), rev'd. and remanded 441 U.S. 919, on remand, _____F.2d_____No. 77-1192 (8th Cir. 1979).

Exemption Three

There are numerous other statutes governing disclosure, which are possible Exemption 3 statutes, but they generally apply only to particular agencies. These too must be examined by an agency with such a statute.

Exemption Six

Furthermore, agencies should review the records to see if there might be information which would be a "clearly unwarranted invasion of personal privacy." Exemption 6 does not apply if the injury to the individual is counterbalanced by a public interest favoring disclosure. (See Chapter IV of "A Short Guide to the Freedom of Information Act," at pages 11-12.)

If material is outside all FOIA exemptions, FOIA requires release. In such cases the Trade Secrets Act is no problem, because it only prohibits unauthorized disclosures, and FOIA itself provides the necessary authorization.

STEP TWO: GIVE NOTICE TO SUBMITTER

If the agency plans to grant the FOIA request, either because the information is considered non-exempt or because the agency wishes to disclose as a matter of discretion even though the material is considered exempt, it is essential as a matter of fairness and sound practice that the submitter be notified and given an opportunity to file objections and arguments, and to seek prior judicial review to block the disclosure.

FOIA does not require agencies to give notice to submitters that a FOIA request has been received which seeks disclosure of information provided to the government by the submitter. However, many agencies have promulgated administrative regulations requiring that prompt notice be given to submitters when the agency receives FOIA requests seeking disclosure of submitter-generated information. Even those agencies which have not promulgated such regulations should give timely notice to submitters of a FOIA request which may jeopardize the submitter's interests. Such notice should normally contain at least the following:

(1) a detailed description of those documents within the scope of the FOIA request;

(2) the date on which the agency desires to make its determination whether or not to disclose all or portions of the requested information;

(3) a request that the submitter provide the agency with any written objection to disclosure, in the form of a detailed identification of each portion of the requested information which the submitter would have the agency withhold, together with specific explanations of all factors weighing in favor of withholding; and

(4) a request that the submitter provide a sworn statement indicating whether or not any portion of the requested information has, to the knowledge of the submitter, been revealed to any person not employed by the submitter or to any other agency.

STEP THREE: CONSIDER TIME LIMITS

Of course, agency communications with both submitters and requesters in these situations must be conducted with due regard for FOIA's time limits, including negotiated and statutory extensions of these limits. Where necessary, seek additional time from the requester within which to respond to the FOIA request.

Since the agency must act on the FOIA request within ten working days, absent "unusual circumstances," the agency should seek from the requester appropriate additional time within which to respond to the FOIA request. (*See* Chapter VI of "A Short Guide to the Freedom of Information Act," referred to above, and the discussion of time limits in Appendix III-B of the Attorney General's Blue Book on the 1974 FOIA Amendments.)

STEP FOUR: DOCUMENT AGENCY CONSIDERATION

The agency should review applicable administrative regulations and statutes providing for disclosure or witholding of agency records. It should consider whatever objections the submitter may provide the agency. It would also be desirable to give the requester a similar opportunity to comment on the submitter's arguments. The agency should determine whether it desires to exercise, where applicable, discretion to disclose information covered by FOIA exemptions. It should prepare a written agency determination identifying those portions of the requested records which it intends to disclose.

The agency should identify all legal standards in determining whether or not FOIA exemptions apply. In addition the agency should normally articulate reasons for discretionary disclosure. Such a statement is especially important when the agency decides in its discretion to release material considered to be exempt but which the agency decides to release because of other factors—which it should identify—that counterbalance the justification for withholding.

Even if an agency finds that material is outside all FOIA exemptions (including any possible Exemption 3 statutes), and therefore *must* be released, it should nevertheless make hypothetical findings concerning a discretionary release where a "reverse" suit can be anticipated. In other words, the agency should consider in appropriate situations whether, even if the records were to be deemed exempt, it would nonetheless release them as a matter of discretion for public interest reasons. This action is recommended so that a proposed release may be defended in court as a proper exercise of discretion even if the court later overturns the agency decision regarding the FOIA exemptions.

STEP FIVE: ALLOW SUBMITTER TO SEEK COURT REVIEW

The agency should provide the submitter reasonable opportunity to seek judicial relief prior to actual disclosure as set forth in the written agency decision.

If the agency determines it will release matter over the submitter's objections, the submitter should be given five or ten days notice of the determination, before the records are actually released to the requester, so that the submitter can file a "reverse" suit to obtain a court review of his objections.

STEP SIX: PREPARE CERTIFIED ADMINISTRATIVE RECORD

For litigation the agency needs to prepare a certified administrative record with all correspondence and other necessary documents to assist the Department of Justice in defending agency decisions to disclose privately generated information.

Since the Supreme Court in *Chrysler* decided that reverse FOIA lawsuits may be brought only pursuant to the Administrative Procedure Act, and that *de novo* review is "ordinarily not necessary," it is vital for the agency to maintain all documents necessary for the preparation of a certified administrative record which will constitute the sole evidence admissible in any lawsuit challenging the agency's decision to disclose submitter-generated information. At a minimum, copies of the following documents should be included as part of the certified administrative record:

- the FOIA request;
- the agency's notice to the submitter;
- the submitter's objections to disclosure;
- any comments by the requester on the submitter's arguments;
- the final agency decision; and
- the requested records marked to indicate those portions which the agency decided to disclose. (This last item of the administrative record may be filed in court under seal.)

In making all of the above determinations, it is vital to create an adequate administrative record of the agency's work on the request and on the submitter's objections. There has been great difficulty in the past in having agency disclosure decisions affirmed by the courts because the courts have insisted on the agency's ability to document its consideration of the arguments for and against disclosure, and to explain adequately the bases of agency action.

While there is some dispute about the scope of judicial review in a reverse case, the Justice Department has taken the position that courts should not decide reverse FOIA cases by a trial-type procedure, with a fresh "starting from scratch" court decision on the facts and issues that presumably were before the agency. Instead the courts should review agency decisions by the standards of the Administrative Procedure Act solely on the basis of the agency record of its action and should decide only the limited question of whether the agency decision was arbitrary, capricious or otherwise not in accordance with law. To achieve this result, it is necessary that the administrative record supporting the agency's action show that the agency adequately considered all issues and reached a reasonable decision which can withstand judicial scrutiny.

Although building a complete agency record may tax agency resources in the short run, in the long run such a record should conserve agency resources. First, the agency should not later be burdened with establishing how it reached such a decision through requests for discovery, nor should it later have to supply expert witnesses in court. Second, with a complete agency record, the courts will be less likely to use a *de novo* review standard and will instead apply the normal standard of review of agency actions. Third, such a complete record of agency action should speed the process of judicial review without the delay encountered in the court's remanding to the agency to make a more complete record of its reasons for its actions and its application of the law.

DISCRETION TO RELEASE

As noted above, even if material *is* within a FOIA exemption, it *may* be released as a matter of discretion, absent some legal prohibition against release outside of FOIA. For example, it would clearly *not* be an abuse of discretion to release material over the submitter's objections where there is some identifiable public interest in the release that counter-balances the risk of injury to the submitter, such as, a public interest in health, safety, economic welfare, integrity of government, etc. Thus, to make a discretionary release of protectible business information, the agency must balance the interests for and against release.

On the other hand, a discretionary disclosure which violates the Trade Secrets Act would be an abuse of discretion. Hence, before such a discretionary release of commercial data may be made, the agency must either find that the information is not within the scope of the Trade Secrets Act or that disclosure is authorized by law.

If exempt documents are outside statutory prohibitions such as the Trade Secrets Act, a discretionary disclosure may be made, subject to the balancing standard noted above. In general, there is likely to be an identifiable public interest in releasing information to assist citizens in maintaining federally recognized interests, *e.g.*, those involving civil rights, certain health and safety interests, etc., although the interest in release may or may not outweigh the injury to the submitter. If exempt documents fall within the scope of the Trade Secrets Act, or some other statute preventing disclosure, then a release would constitute an abuse of discretion and is prohibited, unless the "authorized by law" provision of the Trade Secrets Act is satisfied because the agency operates under a statute (*e.g.*, 42 U.S.C. §1306(a)) which either itself authorizes release or meets the "nexus" test enunciated by the Supreme Court in *Chrysler*. *See St. Mary's Hospital, Inc. v. Califano*, 462 F. Supp. 315 (S.D. Fla. 1979), aff'd *sub nom St. Mary's Hospital, Inc. v. Harris*, 604 F.2d 407 (5th Cir. 1979). *See* also, *St. Joseph's Hospital Health Center v. Blue Cross of Central N.Y., et al.* ____ F. Supp. ____ (N.D. N.Y.1979) 79-CV-416, decided July 11, 1979; aff'd ____ F.2d ____ (2nd Cir. 1979), No. 79-6140, decided Nov. 26, 1979. These "nexus" statutes are ones which evidence a Congressional intention to permit an agency to draft disclosure regulations. An agency which has such a "nexus" statute, and which has promulgated a valid regulation under it, may release data in spite of Trade Secrets Act prohibitions, but agency counsel should consult the Justice Department first before making a decision on this ground.

SUMMARY

Thus, in handling a FOIA request with "reverse" implications, the agency must find whether the information is within an FOIA exemption; if not, it must be released. Even if it is within an exemption the agency should consider whether a discretionary release should be made in the public interest. If so, the agency should then consider whether such a release is permissible in light of the Trade Secrets Act, other applicable statutes, and all relevant factors.

FOIA Legislative Update Business Records

Concern over agency handling of business information has also been a subject of interest on Capitol Hill. The House of Representatives Government Information and Individual Rights Subcommittee of the Committee on Government Operations held hearings before the *Chrysler* case was decided. On July 20, 1978, they issued Report No. 95-1382, entitled FREEDOM OF INFORMATION ACT REQUESTS FOR BUSINESS DATA AND REVERSE-FOIA LAWSUITS. Because of the comprehensiveness of this report, agencies may wish to review it and the subcommittee's suggested procedures.

Additionally, agency personnel may wish to review the proposed new legislative requirements for disputes involving both requesters and submitters in H.R. 5861, a bill introduced on November 9, 1979 by Hon. Richardson Preyer, who chairs the government information subcommittee.

Note Concerning Prosecutions Under 18 U.S.C. §1905, the Trade Secrets Act

After the Supreme Court's 1979 decision in the *Chrysler* case, the Assistant Attorney General of the Criminal Division issued a new section 9-2.025 of the United States Attorneys Manual. The new section, after noting the confusion about releases under FOIA of material that arguably could fall within the meaning of 18 U.S.C. §1905, states "it is the policy of the Criminal Division not to prosecute government employees for a violation of 18 U.S.C. §1905 if the release of information in question were made in a good faith effort to comply with the Freedom of Information Act and the appropriate applicable regulations." Moreover, all U.S. Attorneys are instructed not to initiate an action under 18 U.S.C. §1905 without prior consultation with the Public Integrity Section of the Criminal Division.

SIGNIFICANT NEW DECISIONS

Forsham v. *Harris, Sec'y. of H.E.W.*, 48 L.W. 4232 (Mar. 3, 1980) ("agency records").

Kissinger v. *Reporters Committee*, 48 L.W. 4223 (Mar. 3, 1980) ("improperly withheld" as limiting jurisdiction in FOIA suits).

Founding Church of Scientology, Etc. v. Bell, 603 F.2d 945 (D.C. Cir. 1979). ((b)(1), (b)(3), (b)(5), Vaughn statement).

Church of Scientology v. U.S. Army, 607 F.2d 1282 (9th Cir. 1979). ((b)(1), (b)(6), (b)(7), *in camera* review).

Hayden v. National Sec. Agcy., 608 F.2d 1381 (D.C. Cir. 1979). (b)(1).

Indian Law Resource Ctr. v. Department of Interior, 477 F.Supp. 144 (D. D.C. 1979). ((b)(4)—"privileged").

FOIA COUNSELOR

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THE SPIRIT OF FOIA

The spirit of FOIA requires that agencies give consideration under FOIA to any request which can reasonably be interpreted as one for records.

On this basis, FOIA requests generally will fall into one of three basic types:

1. The requester is clearly asking for records and expressly states that the request is being made under FOIA;
2. The requester is clearly asking for records but makes no reference to FOIA; and
3. The requester expressly invokes FOIA but frames the request as one for information, and the information or some of it is contained in existing records.

Requests in any of the three categories should *at least be considered* under FOIA.

As already noted, (a)(3) does contain two limitations. The first, that the request "reasonably" describe the records being sought, was added by the 1974 Amendments and was intended to codify the prevailing case law. This provision means the request must "be sufficient . . . to enable a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort". *H.R. Rept. No.* 93-876, 93d Cong. 2d Sess. (1974) at 6.

The Attorney General's *Memorandum* on the 1974 Amendments (the "Blue Book"), states (p. 23) that this language means that "it is not enough that the request provide enough data to locate the record; it must enable it to be located in a manner which does not involve an unreasonable amount of effort". Of course, the amount of effort may be very extensive and burdensome without being "unreasonable".

Even if an agency determines that a request does not "reasonably" describe the records sought, it still must consider the request as a FOIA request, although perhaps a defective one. As the Attorney General's Blue Book goes on to say, the agency "should notify the requester of the defect. In addition it is recommended that, when practicable, the agency should offer assistance in reformulation of the request to comply with the Act".

A request framed as one for information rather than records, in addition to being technically defective, may also fall short of reasonably describing the records which it could be interpreted as seeking; but if the request invokes FOIA, it should at least be considered under FOIA.

AGENCY FOIA RULES

The second limitation in (a)(3) that the request be "made in accordance with published rules . . ." is potentially more troubling. Most agencies have published rules requiring that FOIA requests be (1) made in writing, (2) addressed to a specified official or office, and (3) expressly identified as a FOIA request. Although all three of these requirements are generally reasonable and proper, the last two are chiefly for the purpose of reducing delays in internal handling. We consider only (1) to be a sufficient ground for an agency's flatly refusing to process a request under FOIA.

It is neither unreasonable nor in conflict with the spirit of FOIA for an agency to require that a request be in writing. This does not place an undue burden on the requester, and it reduces confusion as to exactly what records are being sought.

Of course, agencies are free to process oral requests for access to records, and this is sometimes done informally for newsmen and others. In a similar vein, requests for clearly available material, *e.g.*, publications, which can readily be granted should be handled without excessive emphasis on technical requirements, particularly where this saves time and money for the requester and the agency.

We should remember that only a small percentage of the population is familiar with the use of the Federal Register and the Code of Federal Regulations, where the technical requirements for making FOIA requests are published. Therefore, agencies usually should at least consider requests that raise questions of rights under FOIA even if the requester has not fully complied with all these rules. Except where the requester has failed to put the request in writing, the chief effect of non-compliance with these technical requirements is that the agency has a reasonable period of time to recognize the request as a FOIA request and to route it to the correct person for processing. In these circumstances, the ten working-day time limit begins when the request is received by the proper official.

In conclusion, no written request from a person which can reasonably be interpreted and handled as a request for access to existing agency records should be denied or rejected unless the agency has first considered it under FOIA.

Approaching the Bench: Affidavits

The single most important assignment in defending a FOIA lawsuit is preparation of an agency affidavit. An affidavit is a document which contains information relevant to a case which is sworn to by the agency employee. The affidavit fulfills much the same function as an individual's direct testimony in court: it is evidence about the facts demonstrating that the government's claims are legally correct. It is not a presentation of legal arguments or legal conclusions.

An affiant may be a high level official at the agency, but often is not. Where several agency employees could appropriately sign the affidavit, the best affiant is often the person most likely to be a good witness if oral deposition is subsequently sought.

The litigator responsible for defending a suit may decide that information is needed from more than one appropriate person at the agency. Thus, "Telling the Agency's Story" fully may require affidavits from several people.

Agency lawyers should adequately research which employees are most knowledgeable about the function of the documents withheld and the harm claimed if they are released. It is these facts that are most likely to help resolve the issues. Is it also necessary to include the chronology of correspondence concerning the FOIA request, but these facts are usually not the ones which explain the basis of the agency's defense.

The legal arguments and legal conclusions are generally set forth in an accompanying memorandum of law. The affidavits signed by agency personnel in FOIA cases are usually used to support a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

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September 22-23: Boston, MA.

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March 25-26: New York, N.Y.
April 10-11: San Juan, P.R.

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Freedom of Information Act/ Privacy Act *$95*
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June 2-3: Philadelphia, PA.
June 5-6: Norfolk, VA.

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Freedom of Information/ Privacy Act *$125*
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April 28-29: Lexington, KY.
May 28-29: Atlanta, GA.

Great Lakes Regional Training Center
Freedom of Information and Privacy Acts Workshop *$110*
Charles Stout 8/353-2927
March 12-13: Chicago, IL.
April 8-9: Indianapolis, IN.
July 29-30: Chicago, IL.
August 26-27: Cincinnati, OH.

Southwest Regional Training Center
Freedom of Information and Personal Privacy *$120*
Larry Embrey 8/729-8241
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September 9-11: Albuquerque, N.M.

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Freedom of Information and Personal Privacy *$100*
Fred Bell 8/234-2304
July 21-22: Denver, CO.
July 24-25: Salt Lake City, UT.

Northwest Regional Training Center
Freedom of Information and Privacy Act *$100*
John Malloy 8/399-7904
April 14-15: Portland, OR.
May 28-29: Seattle, WA.
July 14-15: Seattle, WA.

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FOIA "OPPORTUNITY COSTS"

(Continued from page 1)

remainder travel, training, and materials. With few exceptions, agencies absorb these costs from budgets that do not expressly allow for FOIA activities.

According to Edward D. Jones, III, Senior Economic Adviser in the Justice Department, there are reasons to believe that the $47.8 million figure substantially underestimates the true costs of FOIA. The true costs would include what economists call "opportunity cost", with an example being the Internal Revenue Service's estimated $29 million in lost tax revenue resulting from the diversion of tax return examiners to FOIA activities. While other agencies were able to identify similar costs, they were unable to quantify them. Another example is the ten-day FOIA time constraint that elevates FOIA work to a top level of priority in agencies. This exacts costs in delaying agency business that cannot be recouped.

The next issue of FOIA UPDATE will contain an analysis of FOIA costs and benefits.

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FOIA UPDATE

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Attorney General, OILP Meet USAs

Attorney General Benjamin R. Civiletti took time out at the recent U.S. Attorneys Conference in Washington to meet with Andrea Sheridan Ordin, U.S. Attorney in Los Angeles and Chairperson of the U.S. Attorneys' Advisory Committee, and Robert L. Saloschin, Director of the Office of Information Law and Policy (OILP), to discuss the importance of **FOIA UPDATE** in encouraging agency compliance with the Freedom of Information Act.

The Freedom of Information Act has become an increasing concern to U.S. Attorneys, since a major part of the agency FOIA litigation caseload has been transferred to their offices by the Civil Division.

In a speech before the Conference of United States Attorneys on April 14, 1980, Mr. Saloschin stressed the serious need for cooperation among agencies, the U.S. Attorneys Offices, and the Department of Justice in Washington, D.C. He outlined some of the assistance and guidance services offered by OILP: *FOIA UPDATE*, the *Freedom of Information Case List*—which is presently being revised—and informal consideration on a wide range of FOIA matters. These services are particularly valuable, according to Mr. Saloschin, when novel issues of FOIA law or policy arise. Often OILP will be familiar with an issue that is largely outside the experience of the U.S. Attorneys Office or the agency, and can bring its experience and a government-wide perspective to the controversy.

Mr. Saloschin concluded with the hope that early consultation by agencies and USAs would cut the volume of unnecessary FOIA litigation and enable USAs to defend the remainder more effectively. A phone call to OILP (633-2674) is often the simplest and fastest way to make sure that the position taken in a lawsuit is consistent with the Justice Department's interpretation of FOIA law and policy.

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FOIA UPDATE

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LETTERS TO THE EDITOR

I would like to take this opportunity to congratulate you and your staff for assuming the task of publishing the *FOIA Update* and for your continuing effort to effectuate the implementation of the FOIA. The *FOIA Update* is certainly an idea whose time has come and I am pleased that you have undertaken the responsibility for compiling and disseminating relevant FOIA information. I have particularly found the "Policy Guidance and Reference Material" section of your publication to be most beneficial.

I am confident that your future issues will continue to be instructive.

David L. Feder
Freedom of Information Officer
Federal Labor Relations Authority
Washington, D.C.

WE NEED YOUR HELP!

Our goal is to provide an informative newsletter, but we need your help. Your responses are necessary to keep us on track. We welcome and encourage your input and feedback. Please send your views to Editor, FOIA UPDATE, Room 5259, U.S. Department of Justice, Washington, D.C. 20530.

Costs and Benefits—FOIA

In the current belt-tightening economic climate, many question federal spending. The Office of Information Law & Policy (OILP) asked federal agencies to estimate their 1978 costs and to analyze FOIA costs and benefits.

Agencies reported combined cost estimates of $47.8 million in 1978. This figure probably underestimates the true cost, according to Edward D. Jones, III, Senior Economic Adviser in the Justice Department.

Agencies identified "fishing expedition" requests and related "all record" requests as particularly time consuming and costly. Such requests, which may provide little guidance for search, created higher costs than would be necessary had the requests been clear and specific.

Another significant cost factor resulted from the requirement to review records line-by-line. These review costs cannot be charged to the requestor and may be very high.

In addition, because FOIA review activities divert professionals and other personnel from their principal work, costs described as "opportunity costs" arose. As a result other important agency work was often delayed or performed at a reduced level.

With regard to FOIA compliance, agencies indicated that potential disclosure under FOIA creates costs by adversely affecting behavior of private citizens, such as in background security investigations of the fitness of a job candidate. Businesses perceive a disincentive in submitting requested or required proprietary information that later may be sought by competitors.

Agencies expressed concern over costs arising from the private use of public resources. Examples include the use of FOIA as a substitute for discovery in litigation and the use of FOIA for commercial purposes.

Disclosure of information under FOIA has often been broader and less expensive to the requester than under established discovery procedures. However, the costs to the agency have been substantially higher. Under FOIA there are no limits of relevancy or burden.

Commercial requests for information under FOIA generally fall into two categories: (1) information on competitors in contract proposals and federally mandated information submissions; and (2) information for marketing use, such as mailing, employee, and agency client lists.

(continued on page 7)

FOIbles
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JOSERI FARRIS
10-28

"Poor Jerry was a radical activist all during the Sixties and now, using the Freedom of Information Act, he's found out that *no* government agency kept a dossier on him."

U.S. Department of Justice
Office of Information Law and Policy

FOIA UPDATE

LEGAL AND POLICY GUIDANCE: Status of Internal Audit Reports Under the Freedom of Information Act

Agency personnel often conduct both internal and external audits. Generally, agency personnel conduct internal audits for management purposes, to evaluate the efficiency, economy, effectiveness, financial aspects, or other features of an agency program.

External audits are conducted for contract or grant administration, tax administration, and/or law enforcement. The guidance here pertains largely to internal audits.[1]

BASIC RULES

The general rule under FOIA is that "any person" is entitled to have access to any "agency record" upon request unless it is exempt under one of the nine exemptions in subsection (b). The requester must give a reasonable description of the records he or she wants to see, but a general description is adequate if that is all the requester can provide and the agency is capable of identifying the records he or she wants. "Agency record" is a statutory term which generally covers any record which belongs to an agency, including records on computer tapes.

Even when a record contains exempt information, the other portions of the record must usually be released. Requests for existing agency records that are made in "accordance with published rules" of the agency must either be honored, or if denied in whole or part, the denial must be based on exemptions. If an agency withholds records from a requester, a lawsuit may be brought under the Freedom of Information Act. The government bears the burden of proving that the records are exempt, and the judge may personally examine the records being sued for.

EXEMPT RECORDS MAY BE RELEASED

An agency may voluntarily release even exempt records (sometimes called a "discretionary release") unless release is prohibited by some other law. The Privacy Act is an example of such a law. That Act generally applies only to records that are part of "systems" of records within the meaning of that Act, while the Freedom of Information Act applies to all agency records.

Voluntary disclosure of an exempt record to one person does not bar an agency from withholding the same or similar records from another person if there is a reasonable basis for the difference in treatment. However, if the second person is situated similarly to the first one, denying access on the second request would be unfair, discriminatory, or an abuse of discretion. Thus, an audit report or a draft audit report containing exempt matter might properly be shown to a former agency employee to whose work the report pertained, to obtain his comments, without extending similar access to the world. Generally, equal treatment of requesters is preferable even in those cases where it may not be mandatory.

CONGRESSIONAL ACCESS

A discretionary release to a member of Congress or to a state, local or foreign official in the interest of furthering cooperative performance of functions does not usually compel release to the world. A congressional committee or subcommittee with jurisdiction over the subject matter or the General Accounting Office cannot be denied access to any agency record on the basis of an exemption. Subsection (c) of the Freedom of Information Act states explicitly "This section is not authority to withhold information from Congress."[2]

CHECK CONTENTS OF RECORD

To determine whether any given record is or is not exempt under the Freedom of Information Act, agencies should look at more than just what category the record falls into. Checking the actual contents of the record and the circumstances and purposes of its creation, acquisition or use will sometimes show the record is quite different from what its title suggests.

AUDIT REPORTS PRIVILEGED COMMUNICATIONS

Audit reports are likely to be exempt from release, at least in part, by the "deliberative privilege" of the fifth exemption. That exemption applies generally to privileged communications within the Executive Branch.

The purpose of the deliberative privilege exemption is to encourage candid communications within the government to aid decision-making. Without protection government advisors might be inhibited in expressing their honest opinions and recommendations for fear of outside criticism or pressures. Also, decisionmakers might be inhibited from inviting candid advice. But a record that is protected by the deliberative privilege may lose that protection if it is "adopted" or incorporated by reference in a decision document.

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[1] This guidance is a restatement of a May 16, 1980, memorandum from Department of Justice—Office of Information Law and Policy, to all federal agencies.

[2] For a recent comprehensive discussion of discretionary releases and of Congressional access under FOIA, see the OILP letter of May 29, 1980, to the FTC, which will be publicly available.

Generally, the courts have concluded that internal documents of a *factual* nature, and facts that may be separated from the rest of the document, are not protected by the deliberative privilege, unless the factual material is inextricably intertwined with opinions, recommendations, or policy-making process.[3]

The question whether the factual parts of a particular document are covered by the fifth exemption may be very difficult and uncertain even for experts on Freedom of Information law. However, if the factual material in an internal document is not protected under the fifth exemption, it may sometimes be covered by some other exemption.

FACTS PROTECTED UNDER PRIVACY INTERESTS

Another exemption that may cover the factual portions of an internal audit report is exemption six. The sixth exemption is designed to protect individual privacy, and covers most matter in an individual's medical and personnel files as well as similar information of a personal and private nature. For example, exemption six may protect an individual's home address and other aspects of his or her private life. It may also protect information about an individual's personal history in school or work, particularly if such information could be prejudicial to the individual.

Whether particular information about an individual is covered by exemption six is often a close question. It cannot be resolved just by considering whether the majority of people would prefer to limit circulation of that type of information about themselves. The Attorney General's "Blue Book" on the 1974 FOI Amendments discussed this question in the context of exemption 7(C) and suggested that privacy is involved in "information about an individual which he could reasonably assert an option to withhold from the public at large because of its intimacy or its possible adverse effects upon himself or his family."[4]

A further question under exemption six is whether the invasion of privacy for disclosure would be "clearly unwarranted." That depends on whether there is a public interest favoring release of the information which outweighs the privacy interest.

If an audit report containing facts protected under the sixth exemption is sought under the Act, the solution would ordinarily be to delete the name and other identifying information of the individual. Or, if the requester knows or is likely to discover the identity of such individual despite deletion, the solution is to delete the privacy information itself before releasing the report.

FACTS PROTECTED UNDER INVESTIGATORY INTERESTS

The seventh exemption, which was amended in 1974, is designed to protect "investigatory records compiled for law enforcement purposes" if their disclosure would result in a type of harm specified in clauses (A) through (F) of the exemption. The term "law enforcement" is narrower than "executing the laws" or "carrying out the laws," as "law enforcement" is activity which is targeted against violations of law.

Thus, the seventh exemption does not include investigations that were basically conducted for improving the management, efficiency, or the quality of government operations. This means that the seventh exemption would usually not cover reports of internal audits.

To be "for law enforcement purposes" an investigation (with the exception of background personnel security investigations must be directed against possible violations of law having some sanction, *e.g.*, criminal prosecution, injunction, civil penalty, suspension of a license, etc. An internal audit initiated for normal management purposes may be converted into an investigation for law enforcement purposes if indications of fraud or other illegal conduct are found and are investigated further. To disclose an internal audit report to an employee or other person who is suspected of fraud or illegality may tend to weaken the government's ability to invoke the seventh exemption, as one of the purposes of the seventh exemption is to prevent premature disclosure of the government's case to a prospective defendant. For an analysis of the amended seventh exemption including clauses (A) through (F), see the Attorney General's "Blue Book" on the 1974 FOI Amendments, pp. 4–13.

FACTS PROTECTED UNDER OTHER EXEMPTIONS

Protection of facts in an internal audit report is somewhat less likely under either the second or fourth exemptions. The second exemption is for matters "related solely to the internal personnel rules and practices of an agency." The courts have said this applies to minor internal administrative matters in which there is no significant public interest. For example, an internal audit report might contain information about lunch hour arrangements, parking rules, methods of collecting attendance and leave information, filing procedures, time needed to go to the copying machine, etc., to which exemption two might apply.

The second exemption also has a bearing on whether manuals of instructions to auditing personnel can be withheld under the Act. There are court decisions going in both directions on the question whether certain manuals for the guidance of auditors in IRS, DOD, and other agencies are covered. In general, they are likely to be withholdable under exemption two only to the extent that disclosure would materially prejudice auditing when it is conducted for law enforcement. When exemption two is used to protect internal instructions on sensitive techniques for law enforcement work or the like, it is known as "high-2." Interpretations of law or of regulations in such manuals are generally not withholdable. Audit reports themselves, as distinguished from manuals for auditors, are unlikely to contain "high-2" material.

The fourth exemption, for confidential business information, is chiefly designed to protect businesses from competitive injury through disclosure of trade secrets and other confidential commercial or financial information which these businesses submitted to the government.

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[3] On the question whether to use the deliberative privilege in particular cases, see "Policy Guidance—When to Assert the Deliberative Privilege under FOIA Exemption Five" in FOIA UPDATE, Vol. 1, No. 1, Autumn 1979, issued by DOJ-OILP, pp. 3–5, summarizing our nine-page memorandum of June 6, 1979, on the same subject.

[4] *Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act*, February, 1975, at 9–10.

Exemption four does not apply to governmentally-generated information even where the information relates to and would adversely affect a business firm. But it does protect government-prepared reports to the extent they restate protected information from the business firm.

Exemption four materials are more likely to be found in an external rather than an internal audit report. Sometimes information which was commercially confidential when submitted is no longer so when a request for the record containing it is received, because time or events have taken away the information's potential for injuring the submitter's competitive position. (cont. on p. 5)

PROTECTING SOURCES

If an internal audit report contains facts given in confidence by an employee so that release of the facts would breach the confidence of the employee, there may nevertheless be real difficulty in finding a legal basis (an exemption) to withhold such facts. If the facts relate to the employee himself, access sought by others may be deniable under exemption six, as discussed above. Where the facts do not relate to the employee except that he or she is the source of such facts, privacy may still justify withholding his or her identity if disclosure would result in injury, harrassment or similar adverse effects. If the source furnished the facts as part of a selective or argumentative presentation of recommendations or views on a question of what the agency should do, the deliberate privilege under exemption five may apply.

In cases in which an audit had taken on the aspects of a law enforcement investigation as discussed above, information from an employee given in confidence, at least to the extent the information would tend to reveal his or her identity, would be protected under the seventh exemption, clause (D). However, in the unlikely event that an internal audit report is filed and retrieved in such a manner as to be part of a "system" of records under the Privacy Act, a request from the individual who is a subject of the report can be denied, as to the parts of the report which pertain to him or her, only if Privacy Act exemptions as well as FOIA exemptions apply.

SUMMARY

The thrust of FOIA is toward disclosure. Compliance with the Act is monitored by the Courts, Congressional committees, the Justice Department, the press, various public interest groups, and others. Requests under the Act must be processed promptly, in accordance with the time limits provided in the 1974 amendments and with agency regulations. Although it is sometimes wise to consult informally with those who are the subject of audits to assist in making a determination of the applicability of an exemption, or of the current desirability of voluntarily releasing despite the exemption, it is not necessary to obtain the approval of the audited organization before a report is released.

FOIA Counselor

Privacy Act/FOIA Conflict or Harmony?

The relationship of the Privacy Act to the Freedom of Information Act (FOIA) is a subject of recurring concern. All agency records are subject to FOIA, while the Privacy Act applies only to records in "systems" [defined in 5 U.S.C. 552a(a)(5)] from which information is retrieved by the individual's name or other identifier.

Interface questions arise in two contexts:

(1) requests from a third party for records about another individual in a Privacy Act system of records; and

(2) requests from a first party "individual" for his or her own records in a Privacy Act system.

Third party requests raise only substantive interface questions over how much information may be given to the requester. First party requests present both substantive problems and procedural questions over what "rules of the game" apply.

THIRD PARTY REQUESTS

When a third party requests records about another person that are subject to both Acts, the answer to the interface question is straightforward if the records are not exempt under FOIA. The Privacy Act has *no* limitations on release of such records. Specific language in the Privacy Act [5 U.S.C. §552a(b)(2)] authorizes releases of records where FOIA would require release. An agency must release all requested records which are not exempt under FOIA.

If some FOIA exemption, such as (b)(6), exists to allow an agency legally to withhold the records requested by the third party, then an agency must deny access or justify any discretionary release of those records under one of the ten other types of release permitted by subsection (b) of the Privacy Act without the consent of the individual to whom the records pertain.

FIRST PARTY REQUESTS

First party requests present much more complicated interface problems. When the Privacy Act was passed, there was disagreement as to whether it had become the exclusive vehicle for persons seeking their own records from a system of records. The answer to this question is an unqualified "no." The fact that someone is an "individual" with rights of access under the Privacy Act does not in any way change the fact that he or she is also a "person" with rights of access under FOIA.

Thus, although it need not be counted as such for statistical purposes, a Privacy Act request for access to records should normally be considered as, in effect, also a FOIA request. If, however, all or any portion of the requested material is to be denied, it *must* be considered under the substantive provisions of *both acts*. The withholding must be justified by the assertion of a legally applicable exemption in each Act.

The fact that a record is exempt under one of the two acts is not determinative; if it is not exempt under the other, it must be released to a first party. Furthermore, this is the result whether or not the requester cites the Privacy Act only, FOIA only, both acts, or neither act.

In practice, agencies would not reach the FOIA exemption question unless the records were exempt under the Privacy Act because subsection (q) of the Privacy Act provides that no FOIA exemption may be used to deny an individual's Privacy Act rights of access.

FOIA/PA PROCEDURAL INTERFACE

In addition to these substantive issues, first party requests present significant procedural interface problems. FOIA requires that initial requests for access be answered in ten working days and administrative appeals in twenty. The Privacy Act contains no such administrative deadlines for responding to access requests. The Office of Management and Budget (the lead agency on Privacy Act matters) has recommended that such requests be acknowledged within ten working days and that "[w]henever practicable, that acknowledgment should indicate whether or not access can be granted, and, if so, when." 40 Fed. Reg. 28,957 (1975).

Thus, the question arises as to what procedures are to be followed in processing first party requests for records in a Privacy Act system of records. Although technical arguments can be made that the FOIA time limits apply, OILP believes the substantive complexities of dual processing justify following Privacy Act procedures, including any time limits an agency has imposed on itself by regulation. *See, e.g.*, 28 C.F.R. §§16.45 (initial requests) and 16.57 (appeals). We recommend, however, that because of the technical arguments mentioned above, agencies process these first-party requests in accordance with the FOIA time limits whenever possible.

In closing, note that the above discussion applies only to first-party requests for records in a Privacy Act system of records. First-party requests for records not in such a system are processed *only* under FOIA.

New Decisions

GTE Sylvania, Inc. v. Consumers Union, 48 U.S.L.W. 4293 (Mar. 19, 1980) (withholding pursuant to an injunction against disclosure is not improper).

Crooker v. Pardon Attorney, 614 F.2d 825 (2d Cir. 1980) (records of the Pardon Attorney in the Justice Department are "agency records" even though his functions are to advise and assist the President).

Ryan v. Department of Justice, ___ F.2d ___ (D.C. Cir. Jan. 7, 1980) ((b)(5), agency records, the application of internal deliberative privilege and of concept of "agency records" to documents that were externally generated and solicited by the agency).

Orion Research, Inc. v. Environmental Protection Agency, 615 F.2d 551 (1st Cir. 1980) ((b)(4), procurement documents, (b)(5), adequacy of agency affidavit, burden of proof). proof).

Hoover v. U.S. Dept. of the Interior, 611 F.2d 1132 (5th Cir. 1980)(fee appraisal reports, (b)(5), discovery and FOIA compared).

Coastal States Gas Corp. v. Dept. of Energy, ___ F.2d ___ (D.C. Cir. Feb. 15, 1980) ((b)(5), facts may render legal opinions of government lawyers rulings rather than advice).

Murphy v. Department of the Army, 613 F.2d 1151 (D.C. Cir. 1979)(discretionary release, release to Congress, waiver of exemption). (See OILP letter to FTC of May 29, 1980, on this case.)

FOIA References

UPDATE ON FOIA REFERENCE MATERIALS

The listings under "REFERENCES FROM THE PRIVATE SECTOR" in Vol. 1, No. 1 of FOIA UPDATE at page 5 should be corrected and supplemented as follows:

1. *Access Reports*. The statement that *Access Reports* "contains summaries of selected recent cases but not the complete text" was misleading. The quoted statement is true of the biweekly newsletter of *Access Reports*, but the Reference File of *Access Reports* does contain full texts of major court decisions.

2. Davis, Kenneth Culp, the 1980 Supplement to the *Administrative Law Treatise*, which contains an update on FOIA, is now available for $20.00. (Published by K.C. Davis, The School of Law, University of San Diego, San Diego, California 92110).

3. Marwick, Christine M., editor, *Litigation under the Amended Federal Freedom of Information Act*. A 5th edition is now available. The price is $21 or $7 for non-profit public interest organizations, law students, and law faculty. (Published by the Center for National Security Studies, 122 Maryland Avenue, N.E., Washington, D.C. 20002).

Public Cost/Private Benefit
(continued from page 2)

Agencies may incur heavy costs for providing information that will have primarily a *direct* private benefit. Any *indirect* public benefits from such work are often hard to measure. But there were indications that the competitiveness of small businesses in federal procurement was enhanced by small business access to information such as portions of winning proposals for merely the cost of copying. Similarly, expensive federally-funded research methodologies are available for the cost of copying.

PUBLIC BENEFIT/ PUBLIC COST

Finally, public interest requests for public health and safety records fulfill a FOIA objective to hold regulatory agencies accountable. However, broad requests may be extremely costly. It is difficult to evaluate whether or not the costs may exceed the benefit of the information to the public. Because FOIA has no statutory limitation that requests for records be reasonable, groups' large demands under FOIA can effectively delay agency action.

FOIA BENEFITS

Agencies found the benefits of FOIA as difficult to quantify as they did the indirect costs. Generally, benefits to the government included better management of records and improved relations with the public.

Agencies reported that record quality was enhanced and record accessibility was improved. In addition, for many agencies, FOIA inspired the development of record retention standards that reduced record storage costs. Finally, agencies found that the FOIA-required Public Document Room and Indexes provided useful training facilities to acquaint new employees with agency activities.

Agencies found that FOIA enhanced agency responsiveness to public information needs. The agencies perceive better public understanding of and more confidence in agency work. In addition, FOIA fostered greater public participation in agency decision-making.

Finally, FOIA served broad public interests. Easier information access; greater public awareness of laws, rules, regulations, policies, and procedures; enhanced government efficiency and responsiveness; greater public participation in federal government affairs; enhanced public confidence in the federal government; and better quality information at reduced cost.

CONCLUSION

To assess accurately the magnitude of FOIA-related costs and benefits would be a monumental task. Many of the costs are hard to trace and many of the benefits are subtle. Costs that can be reduced without substantially altering the public benefits of FOIA need to be isolated.

Approaching the Bench

CONTENTS OF AFFIDAVITS

The importance of agency affidavits to the successful defense of any FOIA lawsuit was emphasized in UPDATE's Winter issue. Courts have become increasingly more demanding of such affidavits in recent FOIA cases. They have rejected them for procedural as well as substantive inadequacies.[1] Thus, we need to focus attention on the specifics of agency affidavits which justify withholding of records.

STEP ONE: AGENCY PROCEDURES

The typical affidavit submitted to a court to explain why an agency is withholding records requested under FOIA should serve three purposes. First, it should explain to the court the entire administrative process before the lawsuit and any administrative developments since the lawsuit. The affidavit should list chronologically and attach relevant administrative correspondence. Also, when agency procedures such as how the agency maintains or retrieves records are relevant, the affidavit should explain the agency process.

STEP TWO: *VAUGHN* INDEX

Second, the affidavit should generally describe the records withheld or itemize them.[2] This requirement means preparing a list of each record withheld in whole or in part with identifying characteristics, such as title, date, addressor/addressee and general subject matter. If most of the records have been withheld only in part it is often appropriate to submit copies of these records in the deleted form furnished to the requester as an attachment to the affidavit to help explain the withholding to the court.

STEP THREE: JUSTIFYING CLAIMS OF EXEMPTIONS

Finally, the affidavit should explain how the withheld information is exempt from disclosure under the applicable FOIA exemption(s). This explanation must show how each of the withheld records or portions fit the particular standards of the exemption(s) claimed. For example, to justify withholding under the "deliberative process" component of exemption five, each of the following points should be made as a result of various court decisions:

(a) that the record pertains to a "predecisional" agency matter and does not embody the final agency decision on such matter.[3]

(b) that the withheld information consists of recommendations, opinions, suggestions and analyses pertaining thereto, and thus is "deliberative."[4]

(c) that any disclosure of the information withheld would impair the deliberative process of the agency by inhibiting the full and frank exchange of views necessary with respect to such matters.[5]

(d) that all factual information not covered by some other exemption has been segregated and released, except where such information is "inextricably intertwined" with exempt material, or where the dislcosure of such factual information would itself "expose" the deliberative process.[6]

With such detailed attestations—and with a full description of the administrative process and of the general nature of the records withheld—the agency, the lawyers and the court are in the best possible position to evaluate and to protect the important interests recognized in FOIA exemptions.

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[1] See, e.g., *Founding Church of Scientology v. Bell*, 603 F.2d 945, 947–49 (D.C. Cir. 1979).

[2] *Vaughn v. Rosen*, 484 F.2d 820, 827 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

[3] See, *e.g., Coastal States Gas Corp. v. Department of Energy*, No. 79-2181 (D.C. Cir., February 15, 1980) (slip opinion at 21–27).

[4] See, *e.g., Jordan v. Department of Justice*, 591 F.2d 753, 773–74 (D.C. Cir. 1978) *(en banc)*.

[5] See, *e.g., Mead Data Central, Inc. v. United States Department of Air Force*, 566 F.2d 242, 256 (D.C. Cir. 1977).

[6] See, *e.g., Mervin v. FTC*, 591 F.2d 821, 825–26 (D.C. Cir. 1978).

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A. ATTORNEY TRAINING
LEGAL EDUCATION INSTITUTE
Yvonne Jones, 8-756-6283
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August 7-8: Introduction to Information Law for Attorneys, Los Angeles, CA
September 4-5: Introduction to Information Law for Attorneys, Boston, MA
September 29-30: Introduction to Information Law for Attorneys, Chicago, Il

B. PARALEGAL TRAINING
Alex Bartning, 724-7492
September 22-23: Information Processes for Paralegals, Washington, D.C. $60

II. NEW YORK LAW JOURNAL
James H. Schropp, 342-3764
June 26-27: FOIA, Privacy Act, Sunshine Act Seminar, Washington, D.C. $300
Developments in field of federal information law.

III. USDA GRADUATE SCHOOL
Judy Shortell, 202-447-3247
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July 17-18, 1980
September 11-12, 1980
December 4-5, 1980
March 5-6, 1981

IV. OFFICE OF PERSONNEL MANAGEMENT
Government Affairs Institute
Jane Stewart, 632-5662
August 14-15: A Symposium on the Freedom of Information and Privacy Acts, Washington, D.C. $175
To update FOIA professionals

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- What is Protectible Privacy Information?
- Requests by Congressmen for Exempt Records
- Scope of Discretion for Limited Release of an Exempt Record
- Other Countries Move Toward FOIA

FOIA CASE LIST

The Office of Information Law and Policy is updating the *Freedom of Information Case List*. The new list will include approximately 300 FOIA cases which have been decided since the March, 1979, *Case List* was published. Also, all cases in that edition have been cite checked and Shepardized for accuracy.

Checking the accuracy of that number of cases is both amusing and frustrating, reports Cheri McCracken, the attorney updating the case list.

"First, I experienced disbelief that I was shepardizing over 900 cases; then, despair, when I discovered that *Juris*, a computer legal research system, cannot easily search and shepardize now because of the musical case name syndrome where the name of the case changes." FOIA case names may change when the agency head changes, when the case is appealed and when the agency or agency name changes.

OILP plans to have the *Case List* published by the end of July. Copies of it will be available through the Government Printing Office. Agencies may wish to ride the printing requisition to obtain the *FOI Case List* in quantity. Agencies who wish to so should call Patricia Binninger at OILP (633-2674) for details.

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Office of Information Law and Policy

FOIA UPDATE

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DOD's Keys to Success

Civility is only one of the keys to the Department of Defense's treasure chest of policies and procedures for handling FOIA requests. DOD has a knack for doing the right thing at the right time to facilitate its requests.

Assistant General Counsel Robert Gilliat and his teammate, Charles W. Hinkle, program administrator, designed the Department's successful program. Their continued close rapport has resulted in an enviable achievement.

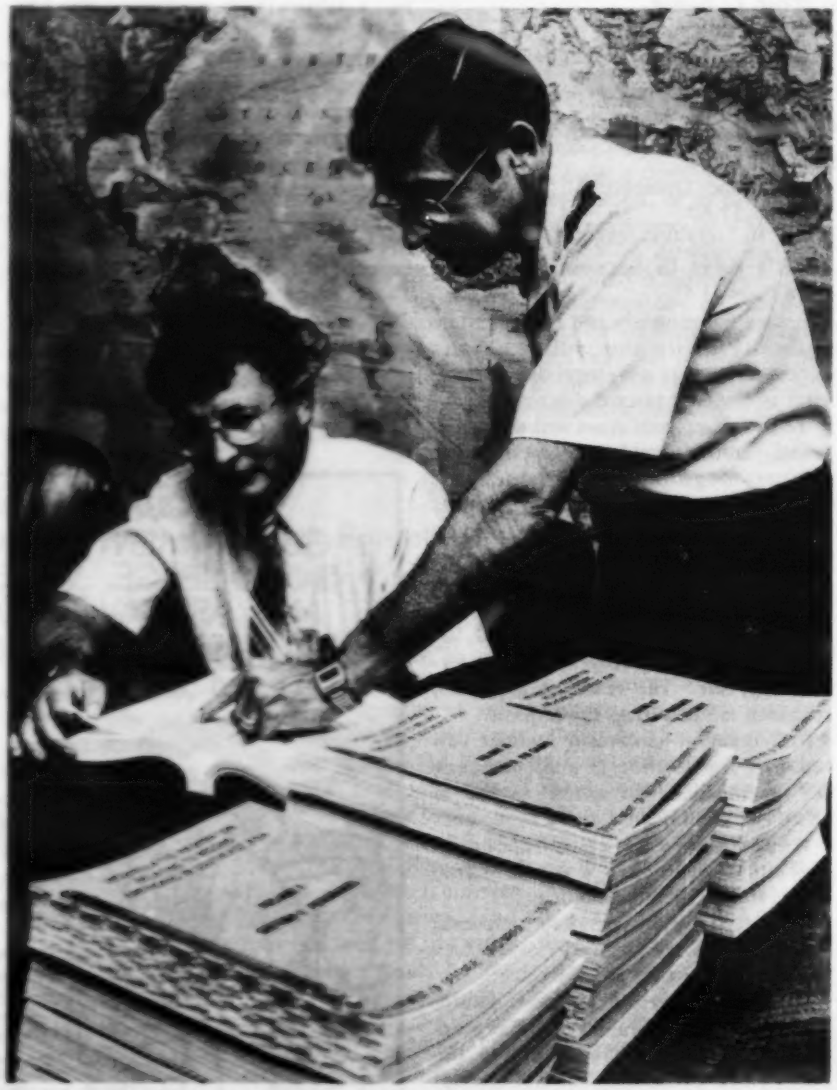
The March, 1980, report of Senate Judiciary Subcommittee on Administrative Practice and Procedure includes the evaluation of Mark Lynch, a private FOIA litigator, as follows: "The Defense Department operates very well. They are generally able to respond within the 10-day time limit. When there are delays, they explain the situation to people—often by telephone. Both the CIA and State Department witnesses raised the question of very large voluminous requests. Well, people are not unreasonable. If you will call them up and tell them that their request encompasses 100,000 documents, they will understand that obviously you are not going to be able to respond in 10 days.

"I think that is one of the most important things about the Defense Department; there is an element of civility in the way they deal with the public. From what I understand, they have very little trouble in people voluntarily consenting to extensions."

Both Gilliat and Hinkle believe the following policies and procedures contributed to DOD's favorable reputation:

- The program has the full support of the Secretary of Defense and Thomas B. Ross, the Assistant Secretary of Defense for Public Affairs. Mr. Ross

(Continued on Page 2)



The Department of Defense in response to FOIA requests from next of kin for records on Missing in Action and Prisoner of War personnel released this 15-volume set of uncorrelated intelligence data. Lt. Col. James Gaston, USAF (standing), who coordinated the project, and Commander Ted Stier, USN (seated), who are both FOI Action Officers at OSD, are shown reviewing one of the more than 300 sets mailed to next of kin requestors. As a former POW, Commander Stier, who was shot down over Hanoi and captured November, 1967, manifested a keen interest in this project when he joined the FOI staff on his return.

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FOIA UPDATE

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DOD's Keys to Success (Continued from Page 1)

oversees the program and has appellate authority. With this public affairs perspective, it is not surprising that his staff is oriented toward disclosure.

- To eliminate confusion and to narrow broad, unmanageable requests, action officers negotiate with requesters. Their sympathetic attention to requests usually leads to a better understanding of the needs and activities of both parties. Even Assistant Secretary Tom Ross has been known to negotiate.
- Printed form letters are not used, although standard paragraphs and terminology are. The result is that each response is tailored to the request.
- Management emphasis assures full rationale for deletion in a document or for withholding an entire record is clearly communicated to the requester.
- Appeals receive an independent evaluation rather than a rubber stamp of the Initial Denial Authority.
- The department has had a liberal fee-waiver policy since 1975. All fees under $30 normally are waived.
- A 1977 policy admonished public affairs officers not to suggest that news media representatives resort to the FOIA since all information not exempt under the Act should be provided them without requiring a formal FOIA request. Since this policy was established, very few formal requests have been received from Washington-based correspondents.

Both Gilliat and Hinkle credited their highly skilled staff for any earned success. Both smiled at the recollection that it had been widely anticipated that the Defense Department would have the greatest difficulty complying with the 1974 amendments. "But we didn't anticipate receiving over 56,000 requests each year," Hinkle added.

Need More Copies of FOIA Update? Here's How to Order

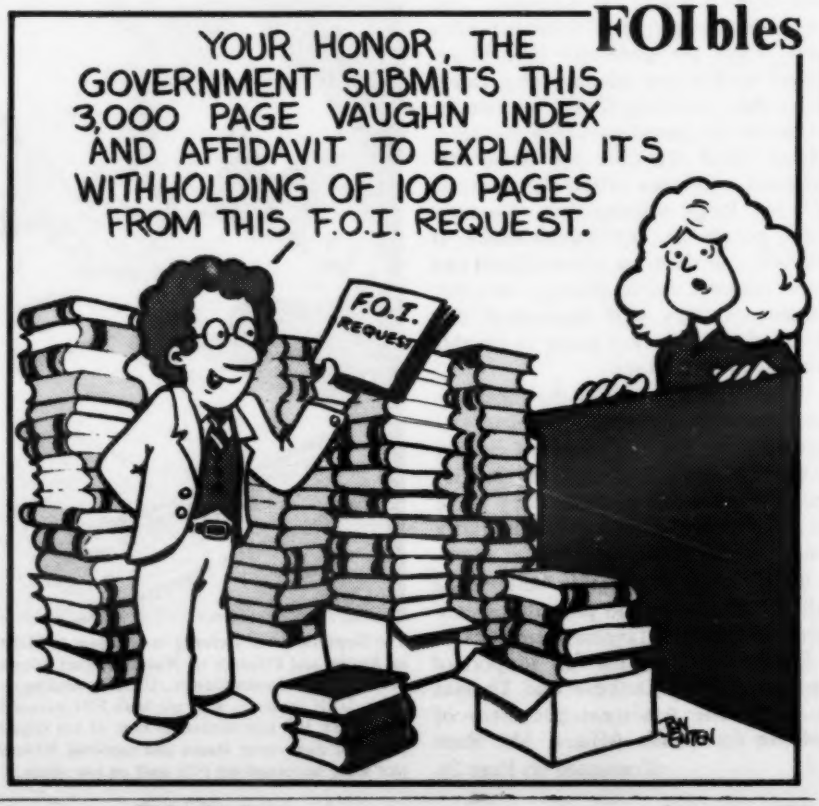
The most cost effective way to order FOIA UPDATE is to "ride" this Department's printing requisition. This is done through the central printing procurement office of your agency. Your printing officer or other official authorized to obtain printing services for your agency may submit a consolidated printing order for the entire agency to the Government Printing Office (this order should be coordinated with your Freedom of Information Act office). The printing order which the printing officer submits (Standard Form No. 1) should indicate that your agency is riding the Department of Justice printing requisition number 0115, Jacket 311-708.

Utah FOIA/PA Seminar for Interior

The United States Department of Agriculture Graduate School's Special Programs Branch took its Freedom of Information Act and Privacy Act course on the road for the Bureau of Indian Affairs to Brigham City, Utah. The two-day course in June was an adjunct to a month-long course on real property for about 40 employees of the Department of Interior's Bureau of Indian Affairs, some of whom travelled from Anchorage, Alaska. The instructors who travelled to Utah from Washington were Cecelia Wirtz, who is Assistant General Counsel, Office of Management and Budget; Kathryn Braeman, Deputy Director, Office of Information Law and Policy, Department of Justice; and William Snider, Administrative Counsel, Justice Management Division, Department of Justice. The subject matter of the course included an overview of the Freedom of Information Act, practical exercises in administering the Freedom of Information Act, and both an overview and a discussion of current issues in implementing the Privacy Act.

The Bureau of Indian Affairs has ex-

(Continued on Page 7)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YOUR HONOR, THE GOVERNMENT SUBMITS THIS 3,000 PAGE VAUGHN INDEX AND AFFIDAVIT TO EXPLAIN ITS WITHHOLDING OF 100 PAGES FROM THIS F.O.I. REQUEST.
F.O.I. REQUEST

U.S. Department of Justice
Office of Information Law and Policy

FOIA UPDATE

Policy Guidance:

Release of Exempt Information to Members of Congress: The Impact of the *Murphy* Decision

Two important Freedom of Information issues of concern to all agencies were recently discussed in a U.S. Department of Justice letter to the Federal Trade Commission (FTC):

(1) How should agencies handle requests from individual Members of Congress for exempt records, and

(2) What factors determine whether an exempt record which has been released to one person may subsequently be denied to another person.

The following article summarizes a May 29, 1980, letter from OILP to the General Counsel of the FTC, which was also released to all federal agencies and is available to the public.

The Justice Department's Office of Legal Counsel, Office of Legislative Affairs, and Civil Division all reviewed OILP's letter and concurred in the substance of it.

The FTC had asked what influence the case, *Murphy v. Department of the Army*, 613 F.2d 1151 (D.C. Cir. 1979), would have on an agency's discretion to release information to Members of Congress and whether Members of Congress could rely on that case to force release of information otherwise exempt from release under the Freedom of Information Act.

These questions arose because in *Murphy* the Army released to a Member of Congress a copy of an advisory legal opinion which technically was exempt from release under FOIA. Later the Army received a FOIA request from Timothy R. Murphy for the same document, and the Army denied release under 5 U.S.C. 552(b)(5). Mr. Murphy sued and claimed that by giving a copy of the exempt document to the Member of Congress the Army had waived the exemption for that document. The Court of Appeals affirmed a lower court decision in favor of the Army, but part of the court's opinion seemed to indicate that members of Congress are legally entitled to exempt documents under FOIA subsection (c). To clarify this point, FTC sought guidance from the Justice Department.

Policy Favoring Release to Members of Congress

From a policy perspective, there is significant practical importance in maintaining a proper flow of information not only to Congress and its committees and subcommittees but also to individual members. A government organized on the principle of separation of powers requires a spirit of cooperation among the branches to operate effectively. Effective government requires a flow of information not only to support institutional knowledge but also to provide information to the individuals who comprise the institution.

Thus, when Members of Congress request information, agencies properly give due weight and sympathetic consideration. The legislator may have a need for access to documents which fall outside the public's right to know under FOIA. The individual member may seek information in his or her official capacity to assist a constituent, to develop and decide on proposed legislation, or to participate in the work of committees or subcommittees to which the member may belong or before which the member may appear. An agency should not lightly deny a request even for records exempt under FOIA if the member of Congress needs the records to carry out an official function. On the other hand, if the agency decides that one or more of the protectible interests reflected in the FOIA exemptions outweigh the member's need in a particular case, the question becomes more complex.

Exempt Records May be Withheld from Members of Congress

Where a requester happens to be an individual member of Congress but is not acting as the chairperson for a congressional committee or subcommittee, an agency may legally withhold records exempt under FOIA. This conclusion is based upon the following five considerations:

1. The plain language of FOIA subsection (c) is that FOIA is not authority to withhold information "from Congress." The word "Congress" is defined in Art. I, Sec. 1 of the Constitution to "consists of a Senate and a House of Representatives." Congress is thus an organized institution, and to equate each individual member with the institution merely on the basis of membership in it would be like treating a legal reference to a "board of directors" as referring equally to each individual director, or a reference to the Army as also referring to each soldier. Since Congress customarily acts through its two houses, the leaders of those houses, its various committees and subcommittees and the chairs thereof, and not through individual members as such, the ordinary meaning of the language of subsection (c) would not include each individual member.

2. Since FOIA was enacted, there have been many occasions in which Congressional committees and sub-

committees and individual Members of Congress have asked agencies to provide records. The Justice Department has often responded to questions from agencies on the relation of FOIA subsection (c) to such requests. At least prior to the *Murphy* opinion, there was seldom any doubt that subsection (c) means basically that an agency cannot use a FOIA exemption to deny access to a record when sought by a Congressional committee or subcommittee. In other words, the provision serves to make clear that the exemptions in the Act were not intended to impair Congress's power to investigate. This is the same purpose that is served by the corresponding provision in the Privacy Act, 5 U.S.C. 552a(b)(9).

While the Privacy Act provision safeguarding this Congressional power is more explicit and detailed, there is no reason to doubt that both provisions are essentially similar in purpose, meaning and effect. Moreover, since FOIA also applies to all records covered by the Privacy Act, the explicit limitations in the Privacy Act would be rendered wholly ineffective if "Congress" in FOIA subsection (c) is read to refer to each individual member.

3. The requesters in a celebrated FOIA case, which arose in the District of Columbia and subsequently was considered both by the Supreme Court and by Congress, were in fact individual members of Congress. *EPA v. Mink*, 410 U.S. 73 (1973). They sued for access not only as a "person" under FOIA subsection (a)(3), but also as members of Congress. Their contention that they were entitled to access to exempt matter under FOIA in their capacity as members of Congress was rejected by the District Court, and thereafter the District Court, the Court of Appeals, and the Supreme Court dealt with the dispute as a normal FOIA case, turning on whether the records sought were exempt. The next year, Congress enacted changes in FOIA that were expressly designed to overturn certain features of the Supreme Court's decision in *Mink*, but Congress like the higher courts left undisturbed the District Court's ruling that an *individual* member of Congress is not legally entitled to records that are exempt under FOIA.

4. If any one of the 535 members of the national legislature in his capacity as such had the power to compel access to exempt records under FOIA, the effect might be to release information which most members of Congress wish to protect and which they thought was protected when they enacted FOIA's exemptions. For example, exempt records include some belonging to the FBI and CIA as well as trade secrets and other exempt private sector information.

5. Finally, the *Murphy* opinion itself indicates that it does not mean that any Member of Congress is entitled under FOIA to access to exempt records. The opinion states, "What is at issue is the construction to be given to that provision of the law [*i.e.*, subsection (c)] which safeguards congressional access to executive information notwithstanding the FOIA exemptions *and the relation of that provision to the question of when confidentiality is waived or destroyed by disclosure to a third party*." (Emphasis supplied.) When the opinion discusses subsection (c) alone, it sets forth the legislative history and the meaning of subsection (c) in clear terms, with the following quotation from the House Report on subsection (c): "Members of the Congress have all of the rights of access guaranteed to 'any person' by [the FOIA], and the Congress has additional rights of access to all Government information which it deems necessary to carry out its functions."

Effect of Prior Release on Agency's Power to Withhold an Exempt Document from Another Person

The second main issue dealt with in the U.S. Department of Justice letter to the FTC is when can an exempt record be released to one person and be withheld from another? Although the opinion in the *Murphy* case relied upon FOIA subsection (c) to support its rejection of Murphy's contention that the Army had "waived" the exemption by giving a copy of the document to the Member of Congress, that subsection was not indispensable to the decision. Even if subsection (c) had never been enacted as a part of FOIA, the result in *Murphy* should have been, and probably would have been, the same. Mr. Murphy was not legally entitled to the document under FOIA because it was exempt. The prior release of a copy to the Member of Congress did not change this status.

Abuse of Discretion—A Limitation Upon Agencies

The basic legal limitation upon agency discretion in acting upon successive requests for the same exempt record is the familiar principle of abuse of discretion. An agency cannot give a reporter for one newspaper a copy of an exempt document in the morning and deny the same document to a reporter for another newspaper in the afternoon, at least absent very extraordinary circumstances. Similarly, denying access to an exempt document sought by one side of a litigated dispute, after having voluntarily given the opposite side a copy of it, may involve unfairness amounting to an abuse of discretion. Such actions, sometimes described as arbitrary and capricious, discriminatory, unfair, or unreasonable, help to define the meaning of an abuse of discretion.

Discretionary Release of Exempt Documents Does Not Waive the Exemption

Absent any abuse of discretion, however, agencies are authorized to exercise their discretion to grant or deny access to an exempt document. They are not subject to any absolute requirement that discretionary access to a par-

ticular person necessarily means that access must be granted to all persons.

For example, the Court of Appeals for the District of Columbia Circuit upheld *per curiam* the decision by the Justice Department to deny general access to the FBI investigatory report on Sirhan Sirhan, an exempt document, even though, it had voluntarily given the same document to the local county prosecutor who was preparing for Sirhan's murder trial. *Committee to Investigate Assassination, Inc. v. Department of Justice*, No. 3651-70 (D.C. Cir. October 24, 1973). The Department's release to the prosecutor was unquestionably discretionary, and its subsequent withholding from a random requester was not an abuse of discretion.

Another illustration would be an agency record containing detailed information on the hazardous characteristics of a new chemical or drug. Such a record might be covered by Exemption 4, 7, 5, or even 1, depending on additional facts and depending on the circumstances. A voluntary release by an agency of the document to those responsible for protecting the public from dangerous chemicals and drugs in a friendly foreign government, or with similar functions in a state or local government, or even to a private physician treating a patient who had been exposed to the chemical or drug, would neither legally nor rationally be sufficient to require its release to a random requester.

A further type of situation is where an exempt internal document containing advice on a complex and controversial problem is voluntarily made available to a professor or similar expert with specialized knowledge or experience on the subject, for the purpose of ensuring that the document's advice to the decision-maker is the best that can be furnished. In this situation, written comments on the document from the professor would often be exempt, and it would be strange if the price of obtaining such additional expert advice were automatically to terminate the exempt status of the internally generated advice.

A final illustration might be records properly classified for defense reasons and covered by FOIA Exemption One. These records may be voluntarily released to, for example, a defense equipment manufacturer, and subsequently may be denied to other requesters. The manufacturer certainly cannot legally compel such access under FOIA, and there is no provision in FOIA which, like subsection (c), could be construed as supporting this difference in treatment between the manufacturer and the subsequent requester. The answer is that no such provision is needed, since the exemptions are discretionary, and exercises of discretion which do not constitute an abuse of discretion are valid and proper.

Agency Discretion in Releasing Exempt Documents Consistent with FOIA Objectives

These conclusions about the scope of and limitations on an agency's discretion to release an exempt document to one person and not another are consistent not only with the central openness objective of FOIA, but also with its egalitarian elements.

As to openness, a decade of government-wide experience in applying the Act to great numbers of requests, plus over a thousand decided FOIA lawsuits with as many still pending, are convincing evidence that there is often serious uncertainty, likely to breed costly and protracted controversy, over whether the records sought by the requester are exempt.

To promote the Act's openness objectives and to minimize the burdens of administration and litigation, agencies have repeatedly been encouraged to make discretionary releases of exempt or arguably exempt matter when granting the particular request will not harm legitimate public or private interests. Some advocates of openness have further urged that agencies release records to a FOIA requester without even considering whether the document is exempt, if the agency perceives no practical danger in granting the particular request. But in cautious and precedent-conscious bureaucracies, such releases will be substantially discouraged if agencies believe that a particular release may carry a penalty in the loss of such discretion as might otherwise exist for possible subsequent requests, in different and unforeseeable circumstances, where the same or similar documents are sought.

As to the egalitarian element in FOIA, it was expressed in one of the major reforms in the 1966 enactment of FOIA, namely, the substitution of "any person" as the requester, in lieu of FOIA's predecessor, the public information section of the 1946 Administrative Procedure Act, which had given a qualified right of access to records only to "persons properly and directly concerned."

This change means that statutory entitlement to access under FOIA to nonexempt records is generally available to all persons. Moreover, whether the records are exempt under FOIA depends generally on the terms of the several exemptions, and these terms generally pertain to the records themselves, *e.g.*, to their contents, origin, purpose, function, or effects if disclosed, and do not pertain in most circumstances to the identity of the particular requester.

However, if the records are exempt under the terms of the statute, the prefatory lanaguage of the exemption subsection confirms the agency's discretion in acting on requests for exempt matter. That prefatory langauge, in subsection (b), states that "This section [*i.e.*, FOIA, including the "any person" provision in subsection (a)(3),] does not apply to matters that are [exempt]". This discretion does not mean that there are no legal limits on unequal treatment of different persons in releasing and withholding an exempt records. But it does mean that where exempt records are concerned, such limits are those which restrain abuse of discretion.

FOIA CASE LIST AVAILABLE

OILP plans to have the 1980 *Freedom of Information Case List* published in October. Copies will be available through the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

FOIA Counselor

The "High" and "Low" of Exemption Two

Agencies and courts have often been uncertain whether Exemption Two of the Freedom of Information Act, which protects internal agency records of a trivial housekeeping nature, also protects internal agency manuals which are essential to instruct agency auditors, inspectors, and investigators. The U.S. Supreme Court upheld the "low-2" protection in *Department of Air Force v. Rose*, 425 U.S. 352 (1976), and reasoned that for minor matters in internal agency management there is no substantial public interest in disclosure. On the other hand, the "high-2" theory to protect sensitive internal agency instructions to law enforcement personnel has not been argued before the Supreme Court, and the Courts of Appeals and District Courts have given mixed guidance.

The government has generally prevailed in its arguments on the need to protect sensitive agency instructions. Its success is mainly due to its ability to convince judges that release of the records would disclose confidential investigatory techniques thereby making it easier for law breakers to escape detection. But when the government has tried to extend "high-2" to other types of instructions, for example, to protect guidelines to prosecutors, it has been unsuccessful.

In *Rose*, the Supreme Court left open the question of whether there is a "high-2." The issue remained relatively dormant until 1978, when there were appellate decisions in two circuits which indicate that there is. In *Caplan v. Bureau of Alcohol, Tobacco & Firearms*, 587 F.2d 544 (2d Cir. 1978), the court protected a BATF pamphlet entitled, *Raids and Searches*. In *Ginsburg, Feldman & Bress v. Federal Energy Administration*, 591 F.2d 752 (D.C. Cir. 1978), the court protected two FEA publications entitled, *Refinery Audit Review Guidelines* and *Guidelines for Audit Modules* and affirmed *en banc* 4-4 without writing an opinion.

On the same day it decided *Ginsburg, Feldman & Bress*, however, the D.C. Circuit also handed down an *en banc* decision in *Jordan v. U.S. Department of Justice*, 591 F.2d 753 (D.C. Cir. 1978). This case involved prosecutorial guidelines which give parameters to prosecutors after the "crooks are caught." The court could have decided that "high-2" was limited to guidelines before the law breaker was apprehended but instead appeared to deny the existence of "high-2" altogether.

Three months later, a district court in the D.C. Circuit considered the Government's "high-2" claim to protect portions of the Secret Service Manual. In *Sturgeon v. Department of Treasury*, No. 77-1961 (D.D.C. 1979), the court expressly considered both *Ginsburg, Feldman & Bress* and *Jordan*, and concluded:

> The Court finds that the portions of the Secret Service Manuals withheld by defendants are internal instructions to government investigators relating to the methods they are to use in investigating crimes before legal action is taken with respect to them. This material is quite different from the prosecutorial policy material held not to be exempt in *Jordan*. The material sought in *Jordan* would not help defendants evade detection or apprehension; it would merely help their lawyers do a better job for them. Disclosure of Secret Service investigative procedures, rules and techniques contained in the material sought by plaintiff *would, on the other hand appreciably assist violators in escaping detection and apprehension*. Nothing in *Jordan* requires this material's production or forecloses its exemption. (Emphasis added.) Slip opinion at 4-5.

Later, this same court supported, without writing an opinion, the Government's withholding of portions of the Drug Enforcement Administration training manuals in *Cox v. U.S. Department of Justice*, No. 78-1944 (D.D.C. 1979). Because the court gave no reasons, it is impossible to know the thinking of the court.

A short time later, the D.C. Circuit upheld the withholding under Exemption Two of portions of the U.S. Marshals Manual. *Cox v. United States Department* of Justice, 601 F.2d 1 (D.C. Cir. 1979). Certain of these portions would apparently qualify under "high-2" as methods to apprehend criminals, but the court based its decision on a "low-2" theory.

In the most recent appellate decision, *Sladek v. Bensinger*, 605 F.2d 899 (5th Cir. 1979), which concerned portions of the DEA Agents' Manual, the Fifth Circuit avoided the "high-2" issue. The court cited *Caplan* and *Jordan* as the leading cases for and against the existence of "high-2" and then stated: "Because we have concluded that disclosure of the sections of the DEA manual requested by Sladek would not impeded law enforcement efforts there is no need for us to choose between the Second Circuit's and the D.C. Circuit's interpretation of Exemption 2 when disclosure would risk circumvention of the law." 605 F.2d at 902. At this writing, no decision has been made to seek *certiorari* in this case.

Thus, even though the Government has been successful in protecting *sensitive* law enforcement investigatory techniques and instructions, the statutory basis for their withholding remains somewhat clouded.

New Decisions

Lesar v. U.S. Dept. of Justice, No. 78-2305 ((D.C. Cir. Jul. 15, 1980), (b)(1), (b)(2), (b)(7)(C), (b)(7)(D) Executive Order 11652, Executive Order 12065, investigatory records, leaks.

Parke, Davis & Co. v. Califano, 623 F.2d 1 (D.C. Cir. 1980) (b)(5), FOIA as a discovery tool.

Common Cause v. National Archives, No. 79-1637 (D.C. Cir. Apr. 30, 1980) (b)(7)(C).

Weisberg v. U.S. Dept. of Justice, No. 78-1107 (D.C. Cir. Apr. 28, 1980) (b)(3) (Copyright Act), (b)(4), agency records, discretionary release, duty to disclose.

Halperin v. C.I.A., No. 79-1849 (D.C. Cir. Jul. 11, 1980) (b)(3), 50 U.S.C. §403 (d)(3), adequacy of agency affidavit, summary judgment.

Hayden v. Nat'l. Security Agency, 608 F.2d 1381 (D.C. Cir. 1979) (b)(1), (b)(3), 50 U.S.C. §402, *in camera* inspection, *Vaughn* index.

Approaching the Bench

The Freedom of Information Act requires a response to an initial FOIA request within 10 working days[1] and a determination of an appeal from an initial denial within 20 days.[2] Either, but not both of these time periods may be extended for 10 days.[3] However, as agencies are acutely aware, the maximum allowable statutory time is simply insufficient in certain circumstances to properly process all requests. Although agencies expended over 47 million dollars in 1978 processing FOIA requests and will expend comparable sums this year, it remains certain that in some instances the agencies will simply be unable to comply with deadlines. Also, it is equally certain that some of the requesters who have not received a response within the deadline will file a civil suit.

Although no agency chooses to be a defendant in a FOIA lawsuit under these circumstances, an agency has an opportunity to present an explanation of why it failed to meet the deadline. Congress and the courts have recognized that circumstances could exist which may prohibit an agency from processing a request within the deadline.

Congress provided an escape valve in section 522(a)(6)(C) of the Act under which a court may grant an agency relief from the deadline in an exceptional circumstance. Specifically the Act provides: If the government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records.

The United States Court of Appeals for the District of Columbia Circuit in *Open America v. Watergate Special Prosecution Force*[4] made an exhaustive analysis of this provision and detailed some exceptional circumstances which warrant utilization of the safety valve. The use of this provision has been followed by the United States Court of Appeals for the Ninth Circuit,[5] adhered to in the District of Columbia[6] and utilized by the District Court for the District of Columbia.[7]

If an agency wishes to persuade a court that the additional time should be allowed, the agency must show:

(1) that "exceptional circumstances exist and,

(2) that the agency is exercising "due diligence."

This showing can be made by affidavit.[8]

The *Open America* court outlined several useful points to consider in making the showing of what constitutes exceptional circumstances and due diligence.

First, the court found that the FBI's first-in, first-out (FIFO) processing procedure was "fair, orderly, and the most efficient procedure" under the circumstances. Second, the court found that there were no allegations by the requester that the FBI failed to allocate appropriate personnel to FOIA processing. Third, the court concluded that "exceptional circumstances" exist when current resources are inadequate to deal with the volume of requests and the agency is exercising due diligence.[9]

While not all agencies may be able easily to embrace the *Open America* tests, an agency must present an affidavit which, at a minimum, first presents a "short look at its present procedure for processing FOIA requests." Second, the agency should detail the volume of requests and its personnel and financial resources devoted to FOIA request processing. An agency should attach any pertinent regulations, policy statements or appropriate material relative to the affidavit.

In conclusion, an agency that makes a strong showing of a volume of requests and a personnel and financial resource problem should be buoyed by the court's statement in *Open America*[10] that "We do not see, either on the face of the statute or on any sane analysis of the situation confronting the FBI and all other Government agencies in regard to Freedom of Information Act requests, why we should order such a reallocation of resources."

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* Prepared by the Assistant United State Attorney Dennis A. Dutterer. Mr. Dutterer is Deputy Chief of the Civil Division of the United States Attorney's Office of the District of Columbia.

[1] 5 U.S.C. 522(a)(b)(A)(i)

[2] 5 U.S.C. 552(a)(b)(A)(ii)

[3] 5 U.S.C. 552(a)(b)(B)

[4] 547 F.2d 605 (D.C. Cir. 1976).

[5] *Exner v. Department of Justice*, 542 F.2d 1121 (9th Cir. 1976). (District Court's refusal to allow additional time reversed on government's *ex parte* motion and District Court directed to determine if "exceptional circumstances" existed).

[6] *Nationwide Bldg. Maintenance, Inc. v. Sampson*, 559 F.2d 704, 715 n.42, (D.C. Cir. 1977); *Cox v. Department of Justice*, 601 F.2d 1, 6, (D.C. Cir. 1979).

[7] *Cleaver v. Kelley*, 415 F. Supp. 174 (D.D.C. 1974). (The District Court, later, while not disturbing its earlier ruling, ordered Cleaver's request moved to the head of the FBI's line); *Stewart—Warner Corp. v. Customs Service*, No. 79-2094 (D.D.C., October 17, 1979); *Timken v. Customs Service*, No. 79-2545 (D.D.C., December 13, 1979); *Greentree v. DEA*, No. 80-1007 (D.D.C. August 7, 1980). (Additional time allowed although Greentree argued the information was needed for an immediate hearing in his 42 U.S.C. 1983 actions.)

[8] *Open America* at 615.

[9] *Open America* at 616.

[10] *Open America* at 614.

Kathryn M. Braeman, instructor in the USDA FOIA/PA Seminar in Brigham City, Utah, assists two of the workshop participants in the first exercise. On the left, Nance Lee Cobe, a realty specialist with the Minnesota Agency of the Bureau of Indian Affairs, who is a member of the Minnesota Chippewa Tribe, and on the right, LaWanda Lafoon, a member of the Colorado River Indian Tribe of Chemehuevi Tribe Descent, who works for the tribe as a Resources Development Coordinator and provides liaison between the tribe and the Bureau on all tribal leases.

UTAH FOIA/PA Seminar (Continued from Page 2)

perienced a dramatic increase in the number of Freedom of Information Act requests received over the past year. Many of the requests are made in field offices. Therefore, the BIA felt the need to have its field employees instructed on how to deal with Freedom of Information and Privacy Act requests they might receive.

Offering a course in the field is a significant contribution to the proper handling of Freedom of Information Act and Privacy Act requests, as field installation records become a more common subject of requests.

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New Association Forming ASAP

An organizational meeting to form an association for all who work with openness-in-government laws will be held Wednesday, October 22, 1980, from 12:00 noon to 1:00 p.m., at the HHS Auditorium, Hubert Humphrey Building, 200 Independence Avenue, S.W., Washington, D.C. The group with responsibilities under FOIA, PA, FACA and the Sunshine Act began meeting in the spring and surveyed colleagues to identify pressing issues in the administration of these openness laws and to select the kind of organization needed to address their concerns.

People working with openness laws felt the need for both an official interagency group and an independent professional association. The transition team working on forming American Society of Access Professionals include Russ Roberts, Milt Jordan, Marilyn McLennan, Cathy McMillan, Kathy Semone, Ed Shomaker, Marye Gannett and Carl Coleman.